LIBRARY
SUPREME COURT, U. S.

FILED
NOV 27 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

REPLY BRIEF ON A WRIT OF CERTIORARI

RICHARD M. KATES
33 N. LaSalle Street
Chicago, Illinois 60602
Counsel for Petitioner

Midwest Law Printing Co. Chicago 60601 Financial 6-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

REPLY BRIEF ON A WRIT OF CERTIORARI

The Response Opposing Certiorari raised many issues for the first time which were not raised in the Petition for a Writ of Certiorari.

The response states that the "key" affidavit (Pet. Appendix p. 3) was submitted on a motion for rehearing and therefore is entitled to no weight. That affidavit was for clarification purposes due to the decision of the Appeals Court although such clarification was not really necessary because of the earlier certification as to what occurred by the Clerk of the District Court which was presented prior respondents' submission of their brief to the Court of Appeals. (Pet. Appendix p. 2.) That certification showed that the date relied on by the Appeals Court and opposing counsel was the date the Judge rendered his opinion and that the date the docket entry was made, which started the 30-day appeal period, was such as to cause the filing of the appeal to be timely. Prior to the earlier certification shown in the appendix, there were also submitted to opposing counsel and made a part of Brainerd's appeal brief a certification by a deputy clerk that showed that the docketing date was such as to make the filing of the notice of appeal timely. Thus the affidavit submitted to the Appeals Court with the motion for rehearing represented no new grounds nor did it present new argument.

Respondent argues that the general form certification by one of the deputy clerk's which is routinely attached to all appeals is conclusive because it generally states that the filings were on the dates designated in the List of Documents. Yet the clerk's docket sheet which is photocopied on page 1 of the appendix of the Petition for a Writ of Certiorari shows no dates were even entered in the column which was to show the date of the entering of orders, and the Clerk of the District Court in specific affidavits and certifications states January 30, 1973 was not the date of the docket entry. The Clerk also explained that the word

"entered" as he used it referred to the date the Judge rendered his decision (Pet. Appendix p. 3).

Respondents repeatedly point out that the Clerk's statement on page 2 of the Appendix of the Petition for a Writ of Certiorari was an unsworn affidavit. That ignores the fact that it is a *certification* by the Clerk of the United States District Court under the seal of that Court which is not a nullity but rather is entitled to the weight of any affidavit.

Respondent asserts that he needs discovery regarding the clerk's clarification. First, what is submitted indicates to the contrary. Second, any generality is due to the fact that the respondent did not question the filing of the notice of appeal until over four months after it was filed. Third, the Clerk of the District Court and his deputies are not adversary parties and their office is open to all, so that if there was truth to respondent's contention that the Docket Entry was made on January 30, 1974 instead of later, respondent could have obtained his own affidavits without the necessity of any formal discovery. Also, this issue was obviously an issue arising in the Court of Appeals, not the District Court, though it should be noted that in his motion for rehearing and in other parts of the appellate procedure, Petitioner Brainerd suggested that if further clarification was necessary, the issue could be sent back to the District Court, but the Appeals Court never did that and indicated that the District Court Clerk simply could not contradict or clarify his docket.

Respondent cites cases from a few state courts which stand for the principle that a clerk cannot clarify his docket (presenting no on point federal cases) but the decisions of this type from 3 out of 51 states do not rule federal court procedure and federal practice.

Respondents assert that to permit the Clerk to correct or clarify his docket entries would ruin Appellate procedure by taking away all stability. That is a baseless assertion. Further this Court should want such clarifications or corrections from the courts it supervises. As was stated at p. 582 in *Danzing* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3rd Cir. 1960) erroneously cited by Respondents as supporting their position, "It would be unfair entrapment of a party to require him to understand and treat as . . . (one type of docket entry) an entry which was not so intended and did not so appear."

Respondent next claims that because Brainerd on his notice of appeal used the date the judge entered his order (as the Clerk also used the word entered for the judges act) it shows knowledge that the docket entry was made on January 30, 1973. That argument raised for the first time is shocking and has no basis in fact as is shown by the Clerk's certifications that the docket entry was made at a later date causing the filing of the notice of appeal to be timely. The use of the date the Judge rendered his opinion on the notice of appeal did not prejudice Respondents who knew what was appealed and fully briefed the appeal on its merits and such usage does not cause the appeal to be invalid. *United States* v. *Arizona, et al.*, 346 U.S. 907 (1951), *State Farm Mutual Auto Insurance Co.* v. *Palmer*, 350 U.S. 944; *Forman* v. *Davis*, 371 U.S. 178 (1962) at 181-2. It should be noted that the first two of the cases just cited were per curiam decisions granting the writ of certiorari, and with that grant, reversing the judgment below which is a fitting procedure for this case.

Respondents also argue that Brainerd has had his day in court already. That argument was made below and was

never accepted by the District Court. Further, since a different cause of action is involved, it is an invalid argument. *Cromwell* v. *County of Sac*, 94 U.S. 351 at 356, *Woodbury* v. *Porter*, 158 F.2d 194 (8th Cir. 1946).

Lastly, Respondents argue that the Petition for the Writ should not be granted because the clerk's practice has changed and now he clearly reflects the date of his entries on the docket in the proper place. However, that practice is not the question, the question is the general principle by the Court of Appeals that the clerk is not permitted to impeach, clarify or explain his docket entry which is a principle of general application in the decision which was printed as being important and which in its holding actually subverts truth, is in conflict with other circuits and calls for an exercise of this court's power of supervision to strike it as precedent.

Respectfully submitted,

RICHARD M. KATES
33 N. LaSalle Street
Chicago, Illinois 60602
Counsel for Petitioner